UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

NOVELIS CORPORATION, Petitioner/Cross-Respondent, JOHN TESORIERO, MICHAEL MALONE, RICHARD FARRANDS, AND ANDREW DUSCHEN, Intervenors, v. THE NATIONAL LABOR RELATIONS BOARD, Respondent/Cross-Petitioner, UNITED STEEL, PAPER AND FORESTRY, RUBBER, MANUFACTURING, ENERGY, ALLIED INDUSTRIAL AND SERVICE WORKERS INTERNATIONAL UNION, AFL-CIO, CLC, Intervenor.	)	CASE NO. 16-3076 CASE NO. 16-3570

PETITIONER/CROSS-RESPONDENT NOVELIS CORPORATION'S RESPONSE TO INTERVENOR USW'S MOTION REQUESTING JUDICIAL NOTICE OF WYMAN CHARGE

On April 3, 2017, Intervenor United Steelworkers ("USW" or "the Union"), filed its Motion Requesting Judicial Notice (the "Motion"). Specifically, the USW moved this Court "to take judicial notice of the Unfair Labor Practice Charge filed by the USW," involving the January 2017 discharge of Brian Wyman, who the

Union asserts supported the USW during the union organizing campaign at issue in this case. The USW asserts that judicial notice should be taken of the Wyman Charge "to show that the Union has alleged the recurrence of unfair labor practices committed by [Novelis] subsequent to the [Board] decision which is currently before this Court," and that "discharging Union supporter Brian Wyman . . . [is] a type of violation which is in part the basis for the bargaining order remedy ordered by the Board."

Before addressing the USW's improper attempt to poison the well, it is important for the Court to understand the context of the Union's motion. By filing the Wyman Charge and its motion, the USW is seeking to protect the job of someone who was piloting a moving overhead crane backwards while texting and then use mere allegations as some kind of justification for overturning the votes of hundreds of people who voted against the USW over three years ago. For what it is worth, Mr. Wyman was terminated because he crashed a moving overhead crane while operating it in a reckless and unsafe manner. Review of available security video shows that at the time of the accident, Mr. Wyman was facing opposite the direction in which the crane was traveling, and texting on his mobile phone. He never turned his head in the direction of travel—and did not look away from his phone—until the moment of impact. Such cranes carry large of metal ingots weighing tens of thousands of pounds, and the unsafe operation of such heavy

machinery can put many lives at risk. Mr. Wyman admitted he was operating the crane while facing backwards and checking for text messages, and acknowledged his actions violated Company safety protocols. While these facts are as irrelevant to the Court's consideration of Novelis' petition for review as the Union's filing of the Wyman Charge, it is telling that the Union fails to mention any of this in its Motion.

Regardless, the USW's Motion is inappropriate. It should go without saying that the filing of an unfair labor practice charge, which amounts to nothing more than an allegation that Novelis has violated the National Labor Relations Act ("Act'), does not remotely establish a "recurrence" of unfair labor practices in this case. Yet this is precisely what the USW is attempting to prove through its request for judicial notice. In essence, the USW is asking the Court to take judicial notice of a mere allegation, which it then intends to argue is evidence of a recurring violation.

The mere filing of the Wyman Charge, however, is proof of nothing. The merits of the charge have not yet been fully investigated by the Board - the USW concedes as much in the Motion. There has been no adjudication finding that Novelis's decision to discharge Wyman violated the NLRA in any respect, much less that it was "the type of violation which is in part the basis for the bargaining order remedy ordered by the Board the NLRA." Thus, whether Novelis committed

any violation of the Act by discharging Wyman is a matter wholly in dispute. As a result, neither the law nor common sense suggests that the USW's request is even remotely valid.[1] In fact, it is not. *See* Fed. R. Evid. 201(b) (specifying that a judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.); *see also Liberty Mut. Ins. Co. v. Rotches Pork Packers, Inc*., 969 F.2d 1384, 1388 (2d Cir. 1992) (noting that a court may not take judicial notice of a document filed in another court "for the truth of the matters asserted in the other litigation"); *Muhammad v. Sams Club*, 2014 U.S. Dist. LEXIS 173053 (E.D. Cal. Dec. 15, 2014) (refusing to take judicial notice of the allegations or statements made in administrative charge of discrimination); *SEIU, Local 1021 v. Private Indus. Council of Solano County, Inc.*, 2013 U.S. Dist. LEXIS 146450

[1] Federal district courts considering motions to dismiss under Fed. R. Civ. P. 12(b)(6) commonly take judicial notice of administrative charges and related documents for the purpose of establishing dispositive facts such as the date the charge was filed, the date a notice of right to sue was issued, and the scope of claims contained in the charge for the purpose of considering exhaustion of administrative remedies. *See e.g., Muhammad v. New York City Transit Auth*., 450 F. Supp. 2d 198 (E.D.N.Y. 2006) (taking judicial notice of EEOC charge for purpose of considering extent to which plaintiff exhausted administrative remedies as to race discrimination claim). Judicial notice of administrative charges for this limited purpose is appropriate since facts such as the date of filing, date of notice, and scope of the claims advanced in the charge are the type of facts that can be ascertained with a high degree of certainty and are not reasonably subject to dispute. To be clear, that is not the manner of judicial notice the USW is requesting here. The USW is attempting to prove a disputed fact (i.e., the lawfulness of Novelis's decision to discharge Mr. Wyman) through judicial notice of mere allegations. Fed. R. Evid. 201(b) makes clear that this is not an appropriate basis for judicial notice.

(E.D. Cal. Oct. 8, 2013) (refusing to take judicial notice of any disputed facts contained in administrative complaints).

The only conceivable reason for the Union's request is that the Union—despite its protestations to the contrary—wants the Court to believe Novelis has violated the Act again and to hold that belief against Novelis during its consideration of the petition for review. Accepting the Union's not-so-subtle invitation would be error. To hold that the mere filing of an unfair labor practice charge—is relevant would encourage parties to flood the Board with new charge filings during the pendency of an appeal, whether such charges are meritorious or not. The affront would be even worse here where the charges at issue have not been fully investigated, determined to have merit, tried before an administrative judge, reviewed by the full National Labor Relations Board, and potentially, a Court of Appeals. Under these circumstances, taking "judicial notice" of the mere filing of the Wyman Charge would risk a violation of Novelis's due process rights, as the Court would be allowing allegations of misconduct that neither the full Board nor a Court of Appeals on review has determined have any factual merit to potentially influence the outcome of this proceeding.[2]

[2] Novelis also notes that NLRB Field Examiner Patricia Petock, the agent responsible for investigating the post-election ULP charges in the instant case, is also responsible for investigating the discharge of Mr. Wyman. Considering Ms. Petock has committed herself to positions in the case at bar, which the USW apparently believes is relevant to Mr. Wyman's discharge, it is fair to assume that it would be difficult for Ms. Petock to exercise the unfettered objectivity to which Novelis is entitled.

Novelis also notes the contradictory nature of the USW's Motion. First, in response to Novelis's motions to reopen the record to submit evidence of changed circumstances to the Board, the NLRB General Counsel, which has been aligned with the USW throughout this litigation, has consistently asserted that such subsequent events are not relevant since the appropriateness of a *Gissel* bargaining order is determined by the Board at the time the unfair labor practices occurred. Here, the USW is submitting the same kind of post-election circumstances that the NLRB General Counsel asserted was irrelevant.

Finally, even if granted, the USW's Motion actually supports Novelis on appeal because it shows that Mr. Wyman is the only union supporter alleged to have been improperly disciplined or discharged since the election occurred over three years ago in a workforce of over 1,000 employees. Put simply, the discharge of one union supporter in over three years for such a serious incident as crashing a crane does not support a claim that Novelis somehow should be considered as an employer likely to violate the Act. The USW's assertion that a single discharge is somehow relevant to the *Gissel* bargaining order when such discharge occurred nearly *three years* after the union election is preposterous to say the least.[3]

[3] If Novelis were to have been fully adjudicated to have systematically eliminated disciplined an avalanche of union supporters from its workforce since the election, this could be relevant to the issuance of a bargaining order. However, that is not remotely the situation here, in which Novelis is alleged to have disciplined one employee who was recorded and admitted to crashing a crane because he drove backwards while texting.

Accordingly, Novelis respectfully requests this Court to deny the USW's Motion Requesting Judicial Notice.

Respectfully submitted, this 13th day of April, 2017.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of PETITIONER/CROSS-RESPONDENT NOVELIS CORPORATION'S RESPONSE TO INTERVENOR USW'S MOTION REQUESTING JUDICIAL NOTICE OF WYMAN CHARGE is being served this 13th day of April 2017 on the following parties of record via CM/ECF:

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